L. A. Water Treatment, Division of Chromalloy American Corporation *and* Leroy Solder for Kenneth Freilich, Sr., Manuel Norberto Hernandez, and Kenneth Freilich, Sr. Cases 21-CA-18509, 21-CA-18594, and 21-CA-18925

August 9, 1982

BY MEMBERS FANNING, ZIMMERMAN, AND HUNTER

DECISION AND ORDER

On December 8, 1980, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondent and counsel for the General Counsel filed exceptions and supporting briefs, and Charging Party Hernandez filed exceptions. Counsel for the General Counsel also filed a brief answering Respondent's exceptions, as well as an opposition to the receipt of the exhibit attached to Respondent's exceptions and supporting brief.[1]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. We agree with the Administrative Law Judge that, under *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), Respondent violated Section 8(a)(1) by denying representation to employee Manuel Hernandez during the interview in which he was discharged. In doing so, however, we do not adopt the Administrative Law Judge's analysis concerning the validity of Hernandez' request for representation, and we find for the following reasons that Hernandez' request was sufficient to invoke *Weingarten.*

The record discloses that on January 14, 1980,[3] Hernandez and Shop Superintendent Ernest Triplett became involved in an argument over a work assignment, and Triplett told Hernandez that he would "get" him for insubordination. It is undisputed that, when Triplett subsequently told Hernandez to come to his office, Hernandez asked that Ken Freilich be allowed to accompany him. Triplett denied that request, and the two then agreed to have Assistant Plant Superintendent Oscar Nunez present at the interview.

Respondent has contended throughout this proceeding that Hernandez' request was invalid, since Hernandez asked for a mere fellow employee and not for an authorized union representative. The Administrative Law Judge found that Hernandez' request was sufficient to invoke *Weingarten*, since Hernandez was unaware of any change in Freilich's status as union steward,[4] and since Triplett failed to notify Hernandez that his request was deficient in that respect. The Administrative Law Judge noted that Respondent's argument might have some validity if Triplett had notified Hernandez that his request was being denied because Freilich was no longer steward. However, he concluded that in the absence of such notice Triplett's refusal can be viewed only as a denial of representation.

Contrary to the Administrative Law Judge, we find applicable to this case the analysis in *Illinois Bell Telephone Company*, 251 NLRB 932 (1980), where the Board found that under the circumstances a request for a fellow employee with no official union status was sufficient to invoke *Weingarten*. There the Board noted that "the right to a representative is one grounded in Section 7 of the Act without reference to whether the employees have a majority bargaining representative."[5] Quoting from *Anchortank, Inc.*, 239 NLRB 430 (1978), the Board further observed that "[t]he Court and the Board [in *Weingarten*] placed the emphasis upon the em-

[1] In view of the result reached herein, we find it unnecessary to reach the General Counsel's motion.

[2] Respondent asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949): "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Unless otherwise specified, all dates herein refer to 1980.

[4] Whether Freilich was still serving as union steward on January 14 is not entirely clear from the record. The Administrative Law Judge noted, without crediting, Union Business Representative Edgar Wiley's testimony that he terminated Freilich as steward after Freilich filed the decertification petition on December 10, 1979. Freilich denied receiving notice that he was no longer steward. The Administrative Law Judge's analysis of the *Weingarten* violation seems to imply a finding that Freilich was no longer steward, but he found at another point that Freilich served as steward for the 2 years preceding his discharge on April 8, 1980. As discussed, *infra*, we find that Hernandez had a right to have Freilich as his representative, even assuming that Freilich no longer held an official union position.

Member Hunter finds, for the reasons set forth by the Administrative Law Judge, that Hernandez' request for Freilich to accompany him to the meeting with Triplett was sufficient to invoke Hernandez' *Weingarten* rights. Thus, as found by the Administrative Law Judge, Freilich had served as the senior ship steward for 2 years; Hernandez was unaware of any change in Freilich's position when he requested Freilich's attendance; and Respondent failed to notify Hernandez of any impediment to his request. Based on the foregoing, Member Hunter finds no need to conclude, as does the majority, that even assuming Freilich no longer was a union steward, Hernandez was entitled to have Freilich as his representative merely because Freilich was a fellow employee. Member Hunter therefore finds it unnecessary to pass on *Illinois Bell, infra*, which forms the basis for the majority's conclusion.

[5] 251 NLRB at 933.

ployee's right to act concertedly for protection in the face of a threat to job security, and not upon the right to be represented by a duly designated collective-bargaining representative."[6] The Board recognized that there may be occasions when an individual's Section 7 interests must yield to the collective decision of his fellow employees, as determined by the majority bargaining representative. However, where the circumstances present no conflict between the employees' Section 7 right to a representative and a union's status as the employees' exclusive bargaining representative, the Board concluded that an employee upon request has the right to the presence of a fellow employee at an interview, even though the requested representative has no official union status. The Board found that the circumstances of that case presented no such conflict, and we find that the circumstances herein are sufficiently similar to those of *Illinois Bell* to warrant the same finding. Thus, as in *Illinois Bell*, there is no evidence here that any other union representative or steward was available at the time of the interview. Further, when Triplett denied Hernandez' request that Freilich be present, Triplett made no attempt to locate a steward and did not offer to delay the interview until a steward could be located. Instead he proceeded with the interview in the presence of Supervisor Nunez. Additionally, as in *Illinois Bell*, there is no evidence that the contract required the presence of a union representative at interviews, and there is no evidence that Respondent and the Union had reached an oral understanding establishing a procedure for representation at interviews. In these circumstances, we therefore find that Hernandez had a right to Freilich's presence at the interview, even assuming that Freilich was no longer serving as union steward.[7] Consequently, we also find that Respondent violated Section 8(a)(1) by denying Hernandez his right to a representative at the interview.

2. We also agree with the Administrative Law Judge that the Board's analysis in *Kraft Foods, Inc.*, 251 NLRB 598 (1980),[8] is applicable to this case, and that the General Counsel has demonstrated the appropriateness of a make-whole order. We note, however, that the Administrative Law Judge incorrectly indicated that under *Kraft Foods* the General Counsel must establish that an employee was discharged "for conduct which occurred at the interview" in order to make a *prima facie* showing that a make-whole remedy is warranted. What we stated in *Kraft Foods* is that the General Counsel must establish that an unlawful interview occurred and that the employee whose rights were violated was subsequently disciplined "for the conduct which was the subject of the unlawful interview." When the General Counsel has thus established a *prima facie* case, the burden then shifts to the respondent to demonstrate that its decision to discipline the employee was not based on information obtained at the unlawful interview.[9]

Applying the *Kraft Foods* analysis to the instant case, we note initially that the General Counsel has established that an unlawful interview occurred. We find that the conduct which was the subject of the interview was insubordination, since Triplett held the interview in order to obtain assurances from Hernandez that he would not be insubordinate in the future. We also find that the General Counsel made its *prima facie* showing and shifted the burden to Respondent by establishing that Hernandez was discharged for failing to provide assurances that he would no longer be insubordinate.[10]

As the Administrative Law Judge correctly found, Respondent has not met its burden of demonstrating that the discipline was not based on information obtained at the unlawful interview. The information obtained was Hernandez' unwillingness to give the requested assurances, and Triplett concedes that he relied on this information in deciding to discharge Hernandez. In fact, Triplett also admitted that his decision as to what to do with Hernandez was contingent upon what occurred at the meeting. In view of the foregoing, we find, in agreement with the Administrative Law Judge,

[6] *Id.* at 933, quoting *Anchortank, Inc.*, 239 NLRB 430 (1978).

[7] We also find that the filing of a decertification petition by Freilich on December 10, 1979, does not present a conflict between the employees' Sec. 7 right to a representative and the Union's status as the employees' exclusive bargaining representative. As the Administrative Law Judge found, Freilich had served as senior shop steward for a substantial period of time, and had represented the Union in contract negotiations with Respondent in November and December 1979. There is no evidence that Freilich was no longer a union member at the time of the interview, and, as noted, the parties had not negotiated any limitations as to who could represent employees in interviews. In fact, as the Administrative Law Judge found, Respondent subsequently permitted Freilich to attend an interview as a representative for employee Hunt. Freilich filed the decertification petition 3 days after the parties had reached a new agreement, because of his displeasure with Union Business Representative Wiley's performance during the negotiations. Under these circumstances, we find that the existence of animosity between Freilich and the Union does not present the type of conflict with which the Board was concerned in *Illinois Bell*.

[8] See also *Illinois Bell, supra*, 251 NLRB at 934.

[9] Member Jenkins adheres to his position in *Kraft Foods* that the appropriateness of a make-whole remedy is established when the General Counsel demonstrates that an unlawful interview occurred and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.

[10] As we have found, the conduct which was the subject of the interview was insubordination. In these circumstances, we view the insubordinate conduct and the failure to give the requested assurances as being inextricably intertwined. Therefore, in finding that Hernandez was discharged for failing to provide those assurances, we are finding that he was discharged for the conduct which was the subject of the interview.

that the appropriateness of a make-whole remedy has been established.

3. As noted above, we agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) by denying Hernandez a representative at the interview, and that the General Counsel has established that a make-whole remedy is appropriate. However, contrary to the Administrative Law Judge, and in agreement with Respondent's exceptions, we find that Respondent did not independently violate Section 8(a)(1) by discharging Hernandez. As the Board indicated in *Kahn's and Company, Division of Consolidated Food Co.*, 253 NLRB 25 (1980), "discipline imposed for conduct which is the subject of a *Weingarten* interview does not itself constitute a separate violation of Section 8(a)(1) of the Act, unless the General Counsel shows that the employee was discharged for requesting the presence of his union representative or for engaging in other protected activity unrelated to the exercise of the employee's *Weingarten* rights."[11] In the instant case, the General Counsel presented no evidence that Hernandez was discharged for requesting a union representative or for engaging in other protected activity. Accordingly, we shall make appropriate modifications to the Administrative law Judge's Conclusions of Law and to his recommended Order.

4. The Administrative Law Judge found that Respondent made a valid offer of reinstatement to Hernandez as of January 21, and that by failing to accept the offer Hernandez forfeited his right to further backpay.[12] We find merit to the General Counsel's exceptions concerning this issue, and we find for the reasons below that Respondent did not make a valid offer of reinstatement.

Hernandez was terminated on Monday, January 14, and on the next day the Union's Business Representative Edgar Wiley obtained an agreement with Respondent whereby Hernandez would be permitted to return to work on the following Monday, January 21. Wiley was unable to reach Hernandez until Wednesday, January 23, when Hernandez called Wiley from his new place of employment. Wiley's credited testimony does not disclose the manner in which he initially phrased the offer, and he testified only that Hernandez' first response was that he had a good spot and was not interested in going back to work for Respondent. Wiley then testified that he subsequently told Hernandez, "Please consider it very carefully. You will be going back on the basis that you will go back to work immediately, and we would arbitrate for whatever lost days you may have." When Hernandez again declined to return to work, Wiley told him to think it over for an extra day. Wiley testified that he spoke with Hernandez on Thursday, January 24, but again his testimony discloses only the fact of Hernandez' refusal, which Wiley characterized as "very firm," and not the language Wiley used in making the offer.

According to the credited testimony of Vice President and General Manager Richard Scott, Wiley informed Scott on January 24 of Hernandez' refusal. Scott responded, "Well, then as far as I am concerned, the case is closed; we have made an offer and he refuses to come back, and he will have to take his next step." Finally, Wiley's credited testimony discloses that Hernandez came into the union office on February 2. Wiley again talked to him about employment with Respondent and offered to "take a shot at it again, if you want." Wiley testified that Hernandez responded "absolutely no."

The Board has often observed that an employer's offer of reinstatement must be "specific, unequivocal, and unconditional"[13] in order to toll the backpay period. It is the employer who carries the burden of demonstrating a good-faith effort to communicate the offer to the employees.[14] An employer is relieved of his duty to reinstate only when a proper offer is made and unequivocally rejected by the employee.[15] The Board has also required that an offer of reinstatement must allow the employee a reasonable time in which to make arrangements to begin work.[16] This requirement takes on a special significance where, as in the instant case, the employee has obtained other employment at the time the offer is made. In such circumstances, the Board requires that the reinstatement offer afford the employee an opportunity to make a considered choice whether to retain his present employment or to return to his former job. The offer must also allow the employee to give reasonable notice to his current employer should he choose the latter course.[17]

[11] 253 NLRB at 25.

[12] The Administrative Law Judge found that, in view of the uncertainty caused by the offer, Hernandez would not be deemed to have waived his right to unconditional reinstatement. He therefore ordered reinstatement, and provided for backpay from January 14 to January 21, as well as from 5 days after the date of the order to the date Respondent makes a valid reinstatement offer.

[13] *Standard Aggregate Corp.*, 213 NLRB 154 (1974).

[14] *Lipman Bros., Inc., et al.*, 164 NLRB 850, 853 (1967).

[15] *Lipman Bros., Inc., supra* at 853, and cases cited at fn. 22. See also *Don Pizzolato, Inc.*, 249 NLRB 953, 956 (1980); *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978).

[16] *Betts Baking Company*, 173 NLRB 1018 (1968); *Harrah's Club*, 158 NLRB 758, 759, fn. 1 (1966).

[17] *Dobbs Houses, a Division of Squibb Beechnut, Inc.*, 182 NLRB 675, 682 (1970). See also *W. C. McQuaide, Inc., supra* at 671; *Betts Baking Company, supra* at 1018-19; *Thermoid Company*, 90 NLRB 614, 616 (1950).

In the instant case, as noted above, Wiley obtained an agreement from Respondent that Hernandez could return to work on January 21. However, Wiley did not speak with Hernandez until January 23, when Hernandez had already obtained other employment. By phrasing the offer to require that Hernandez return to work "immediately," Wiley clearly failed to afford Hernandez sufficient time in which to make a considered choice concerning his employment or to give adequate notice to his current employer. That Wiley gave Hernandez an extra day to reflect upon the offer does not alter our finding, since the Board has previously found to be inadequate offers requiring acceptance within 4 days.[18]

We also find that a valid offer was not made to Hernandez during his encounter with Wiley at the union office on February 2, even assuming that Hernandez was no longer employed.[19] We note initially that on January 24, when informed of Hernandez' refusal, Scott told Wiley that the "case is closed." Scott clearly manifested in this statement an intention to withdraw the offer and to withdraw Wiley's authority to make any further offers to Hernandez. Additionally, on February 2, Wiley merely stated that he would "take a shot" at having Hernandez return to work. In doing so, Wiley simply indicated his willingness to intercede on Hernandez' behalf and was not making a clear reinstatement offer. Hernandez' rejection of Wiley's proffered assistance is therefore of no consequence in this context.

Apart from the above considerations, we are also not satisfied that Respondent has met its burden of adducing sufficient evidence to warrant the conclusion that a valid offer of reinstatement was made. We have found above that Wiley's testimony does not reveal the manner in which he phrased the offer to Hernandez, either at the time of the initial offer on January 23 or at the time of the offer on January 24. Wiley merely noted the fact of Hernandez' refusal on both occasions. Consequently, the record does not disclose the nature of the communications to which Hernandez was responding at the time of those refusals. As to the specific terms of the offer, the record reveals only that, soon after Hernandez' initial refusal on January 23, Wiley told him that he would be going "back to work immediately," and that they would go to arbitration concerning the days he had missed.

We find that the absence of testimony concerning the specific terms of the offers made on two occasions is crucial in this case, in view of the Administrative Law Judge's specific finding that the offer caused uncertainty and that Hernandez believed that acceptance would have been tantamount to an admission on his part. The Administrative Law Judge's finding in this regard is amply supported by the record, since Hernandez testified that he recalled the offer as being conditioned upon his acceptance of a suspension, and since he also testified that he told Wiley that "[u]nder those conditions" he would not accept the offer because he was "not guilty."[20]

In view of Hernandez' confusion and the insufficiency of Wiley's testimony, we cannot say that the record clearly discloses that a proper offer of reinstatement was made. We shall therefore modify the Administrative Law Judge's recommended remedy accordingly.[21]

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3:

"3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by threatening to discharge employees if they did not withdraw a decertification petition; by threatening to close its plant if employees decertified the Union or selected a labor organization other than the Union as their collective-bargaining representative; and by denying the request of employee Manel Norberto Hernandez to have representation at an investigatory interview which he reasonably believed might result in disciplinary action against him."

[18] See *Betts Baking Company, supra* at 1017-18; *Harrah's Club, supra* at 759, fn. 1 and 762, fn. 5, and accompanying text; *Thermoid Company, supra* at 616.

[19] The record discloses some confusion as to whether Hernandez was unemployed as of February 2. Hernandez never affirmatively testified that he was unemployed. He did testify that he was attempting to get unemployment compensation, and that the unemployment office had directed him to obtain some papers from the Union. Wiley at first testified that Hernandez stated that he was unemployed, but subsequently testified that he merely "assume[d]" that Hernandez no longer had a job, since the unemployment office had directed him to the Union.

[20] We discuss Hernandez' testimony here only to emphasize that confusion existed, and not to demonstrate that Wiley actually included these terms in the offer. Hernandez' testimony, which supports the Administrative Law Judge's finding that the offer caused uncertainty, serves to highlight the inadequacy of Wiley's testimony concerning the terms of the offer which he communicated to Hernandez.

Further, we also find that Hernandez' refusals to return to work, which were characterized by Wiley at one point as being "very firm" and which included a statement on February 2 that he "absolutely" would not return, must be viewed in the context of his confusion as to the terms of the offer. Because of his confusion, it is clear that by his refusals Hernandez did not manifest an unequivocal intention not to return to work under any circumstances.

[21] In accordance with our procedure in similar cases, we shall also modify the Administrative Law Judge's recommended Order to require that Respondent expunge from its files and records any and all references to Hernandez' unlawful interview and discharge. We shall make the same provisions with respect to Kenneth Freilich's discharge.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discharged employee Kenneth Freilich in violation of Section 8(a)(3) and (1) of the Act, and having found that a make-whole remedy is appropriate for employee Manuel Hernandez, we shall order Respondent to offer each employee immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall order Respondent to make Freilich whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, by paying to him a sum of money equal to the amount he normally would have earned in wages from April 8, 1980, the date of his discriminatory discharge, to the date on which Respondent makes a valid offer of reinstatement to him, less net earnings during said period, plus interest. We shall order Respondent to make Hernandez whole for any loss of earnings he may have suffered, by paying to him a sum of money equal to the amount he normally would have earned as wages from January 14, 1980, the date of his discharge, to the date on which Respondent makes a valid offer of reinstatement to him, less net earnings during said period, plus interest. The amount of backpay due shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).[22]

We shall also order Respondent to expunge and remove from its records and files all references to the interview and discharge of Manuel Hernandez, and all references to the discharge of Kenneth Freilich. See *Sterling Sugars, Inc.*, 261 NLRB No. 71 (1982).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, L. A. Water Treatment, Division of Chromalloy American Corporation, City of Industry, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(d) and reletter the subsequent paragraphs accordingly.

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge and remove from its records and files all references to the interview and discharge of Manuel Hernandez on January 14, 1980, and all references to the discharge of Kenneth Freilich on April 8, 1980, and notify them in writing that this has been done and that evidence of these unlawful disciplinary actions will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

I agree with the majority that Respondent violated Section 8(a)(1) by denying representation to employee Manuel Hernandez during the interview which resulted in his discharge, and that Respondent subsequently failed to make a valid offer of reinstatement to Hernandez. I also agree with the majority's finding under *Illinois Bell Telephone Company*, 251 NLRB 932 (1980), that Hernandez was entitled to have employee Kenneth Freilich as his representative, and with the finding that a make-whole remedy is appropriate. Contrary to my colleagues, however, I would adopt the Administrative Law Judge's finding that Respondent's discharge of Hernandez constituted an independent violation of Section 8(a)(1).

The Administrative Law Judge found that, after an argument during which Shop Superintendent Ernest Triplett threatened to "get" Hernandez for insubordination, Triplett conducted an interview with Hernandez for the purpose of obtaining assurances that he would not be insubordinate in the future. Triplett denied Hernandez' request that Freilich be permitted to act as his representative, but subsequently agreed to have Supervisor Oscar Nunez present. Hernandez failed to provide the requested assurances, and Triplett terminated him at the meeting.

The majority relies upon *Kahn's and Company, Division of Consolidated Food Co.*, 253 NLRB 25 (1980), as establishing the prevailing rule regarding the circumstances in which the Board will find an independent Section 8(a)(1) violation as to the discipline imposed in connection with an unlawful interview.[23] That case cites *Illinois Bell, supra*, for

[22] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[23] Although I participated in the original decision in *Kahn's and Company*, I subsequently clarified my position when the Board denied a *Continued*

the proposition that an independent violation will not be found unless an employee "was discharged for requesting the presence of his union representative or for engaging in other protected activity unrelated to the exercise of the employee's *Weingarten* rights."[24] In my view, *Illinois Bell* does not establish that proposition. In *Illinois Bell*, the General Counsel alleged in his complaint that the respondent violated Section 8(a)(1) by discharging an employee because she requested representation at an interview.[25] The Board merely dismissed the complaint in that respect because the General Counsel failed to present sufficient evidence in support of its allegation. At no point did the Board state that an independent 8(a)(1) violation will be found *only* where it is established that an employee was discharged because of a request for a representative or for engaging in other concerted activity.

Contrary to my colleagues, I would find that the discipline imposed in connection with an unlawful interview violates Section 8(a)(1) where the General Counsel has affirmatively established that an employer relied on the tainted information obtained at the interview in imposing the discipline.[26] In reaching this conclusion, I note that the central function of a *Weingarten* representative, as the Supreme Court has observed, is to clarify information and to provide assistance to an employee who may be "too fearful or inarticulate" to relate accurate information, or "too ignorant to raise extenuating factors."[27] Therefore, the employer who denies representation to an employee during an interview creates circumstances which are conducive to the production of inaccurate and incomplete information concerning the events which prompted the interview. Consequently, when an employer engages in misconduct like that involved herein, it acts in disregard of employees' Section 7 rights in two respects. Not only does the employer ignore an employee's right to a *Weingarten* representative, but it exacerbates that initial coercion by disciplining the employee based on information which, as a result of the denial of representation, is in all likelihood incomplete or inaccurate. In my view, the discipline cannot be lawful if it is based on information which is distorted because of the employer's unlawful denial of representation, and I would find that such discipline violates Section 8(a)(1) and warrants remedial action by the Board in the form of a cease-and-desist order and the posting of an appropriate notice. In similar circumstances, the Board has always viewed the threat to discharge an employee for engaging in protected concerted activity and the resulting discharge for engaging in such activity as constituting separate violations of the Act. My colleagues have failed to adequately explain their rationale for reaching a different result herein.

Applying this analysis to the instant case, I note, in agreement with the majority, that the information obtained at the interview was Hernandez' unwillingness to provide assurances that he would no longer be insubordinate. In view of Triplett's concession that he utilized this information in discharging Hernandez, I would find that the General Counsel has met his burden of affirmatively establishing reliance. Accordingly, I would find that Respondent engaged in an independent violation of Section 8(a)(1) by discharging Hernandez.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

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motion for reconsideration in the same case. See my concurrence in *Kahn's and Company, Division of Consolidated Food Co.*, 256 NLRB 930 (1981).

[24] 253 NLRB at 25.

[25] 251 NLRB at 934.

[26] The General Counsel's burden in this regard can be clarified by considering it in the context of the various burdens arising in connection with unlawful interviews. Thus, under *Kraft Foods, Inc.*, 251 NLRB 598 (1980), the General Counsel can make a *prima facie* showing of the appropriateness of a make-whole remedy by establishing that an unlawful interview occurred and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. When a *prima facie* showing has been made, the majority analysis in *Kraft Foods* provides that the burden then shifts to the employer to prove that it did not rely on information obtained at the interview in imposing the discipline. Under that analysis, a make-whole remedy is appropriate if the employer fails to meet its burden. In my view, the General Counsel can further prove that the discipline itself, and not simply the interview, violates Sec. 8(a)(1) by affirmatively establishing that Respondent relied on the tainted information obtained at the interview in imposing the discipline. This is particularly true where, as here, the employer concedes that it relied on the information obtained at the interview.

[27] *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 263–264 (1975).

WE WILL NOT threaten employees with discharge if they do not withdraw a decertification petition.

WE WILL NOT threaten employees with plant closure if they decertify the incumbent Union and/or select a labor organization other than the incumbent as their collective-bargaining representative.

WE WILL NOT deny the request of union representation to employees at investigatory interviews when the employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action.

WE WILL NOT discharge employees because of their activities on behalf of a petition to decertify International Union of Operating Engineers, Local No. 501, AFL-CIO, as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer Manuel Norberto Hernandez and Kenneth Freilich, Sr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; and WE WILL make them whole for any loss of earnings they may have suffered by reason of our discrimination against them, plus interest.

WE WILL expunge and remove from our records and files all references to the interview and discharge of Manuel Norberto Hernandez on January 14, 1980, and all references to the discharge of Kenneth Freilich on April 8, 1980, and notify them in writing that this has been done and that evidence of these unlawful disciplinary actions will not be used as a basis for future personnel actions against them.

L. A. WATER TREATMENT, DIVISION OF CHROMALLOY AMERICAN CORPORATION

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This matter was heard before me at Los Angeles, California, on August 19 and 20, 1980. Pursuant to a charge filed in Case 21-CA-18509 against L. A. Water Treatment, Division of Chromalloy American Corporation (herein called Respondent) by Leroy Solder for Kenneth Freilich, Sr., on December 18, 1979, and a charge filed in Case 21-CA-18594 against Respondent by Manuel Norberto Hernandez on January 17, 1980, the Regional Director for Region 21 of the National Labor Relations Board issued a consolidated complaint against Respondent on February 29, 1980, alleging that Respondent has committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).[1] Pursuant to a charge filed in Case 21-CA-18925 against Respondent by Freilich on April 9, 1980, the Regional Director issued an amended consolidated complaint against Respondent which alleges certain violations of Section 8(a)(1), (3), and (4) of the Act.

The parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Post-trial briefs were filed on behalf of the General Counsel and Respondent. Based on the entire record, on the briefs filed by counsel, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material herein, Respondent has been a Delaware corporation engaged in the design and fabrication of water treatment equipment with a facility located in the City of Industry, California. In the operation of said facility, Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that at all times material herein International Union of Operating Engineers, Local No. 501, AFL-CIO, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

As discussed above, Respondent is engaged in the design and manufacture of water treatment equipment. The Union has represented Respondent's production and maintenance employees since 1948.

During 1979, Respondent's City of Industry operations lost in excess of $1 million. In an attempt to improve the situation, Respondent created a new management position, vice president and general manager, to oversee all

[1] The consolidated complaint included allegations in Case 21-CB-7168 that International Union of Operating Engineers, Local No. 501, AFL-CIO, had committed certain unfair labor practices in violation of Sec. 8(b)(3) of the Act. On June 19, 1980, the Regional Director approved Respondent's request to withdrawn its charge against the Union, and severed Case 21-CB-7168 from the instant cases. The complaint allegations pertaining to Case 21-CB-7168 were withdrawn.

operations. On November 1, 1979, this new position was filled by Richard Scott. Effective December 17, 1979, Scott made several changes in Respondent's supervisory hierarchy in an attempt to achieve more direct supervision over the production and maintenance employees. Two changes relevant to these proceedings were that Daniel Giacoletti was promoted from plant superintendent to plant manager and Ernest Triplett was promoted to the newly created position of shop superintendent.

During the same period of time that Scott was assuming his position with Respondent, the Union and Respondent were engaged in negotiations for a new collective-bargaining agreement. In these negotiations, the Union was represented by Edgar Wiley, business representative; Kenneth Freilich, Sr., senior shop steward; and Bill Hunt, junior shop steward. During the negotiations, Freilich became displeased with Wiley's performance. On December 7, Respondent and the Union reached agreement on a new collective-bargaining agreement. On December 10, Respondent sent a signed copy of a memorandum of agreement to the Union for signature. Also on December 10, Freilich filed a petition for a decertification election in Case 21-RD-1663.

It is within this factual framework that the General Counsel alleges that Respondent threatened Freilich with termination and plant closure if he did not withdraw the decertification petition and discharged Freilich because of his participation in the decertification proceedings and/or because of his participation in this unfair labor practice proceedings. Further at issue is whether Respondent violated Section 8(a)(1) of the Act by conducting an investigatory interview with Hernandez after denying his request to have Freilich present during the interview.

B. *The Alleged Threats to Freilich*

As discussed above, Freilich, unhappy with Wiley's representation, filed a decertification petition on December 10. According to Freilich, on December 26, he was told by Dominic Giacoletti, assistant plant superintendent,[2] whom I find to be supervisor, that if Freilich did not withdraw the decertification petition he would be fired. Giacoletti further told Freilich that, if the Union did lose, the employees would have no protection and eventually would lose their jobs or the plant would close because Respondent would not accept any other union. Giacoletti said that he was responsible for bringing in the Union and the Union would remain—Freilich and the "rest of the troublemakers" would be the ones to go.

Dominic Giacoletti did not deny making these statements. Giacoletti, a member of the Union, testified that he was speaking for himself and not Respondent when he discussed the adverse effects of decertification. Giacoletti testified that he believed decertification would cause the employees and himself to lose health and welfare and pension benefits secured by the Union's collective-bargaining agreement. Respondent contends that it is not responsible for Giacoletti's statements to Freilich.

Also on December 26, Freilich had a conversation with Triplett about the decertification petition. According to Freilich, Triplett asked Freilich if he realized "all the trouble he was causing" with respect to decertifying the Union. Triplett told Freilich that, if he continued with what he was doing, he (Freilich) and the rest of the troublemakers would be terminated. Triplett further said that, if Respondent became angry over the events, it would close the plant and then none of the employees would have a job. Prior to Triplett's becoming a supervisor, Freilich had approached Triplett and solicited his support for the decertification petition. Triplett expressed his opposition to the petition and argued in favor of the Union and the impending collective-bargaining agreement.

Triplett did not deny making the statements attributed to him. Triplett testified that it was his opinion that consumation of a collective-bargaining agreement between Respondent and the Union was essential to the economic survival of the Company. He expressed that opinion to Freilich. Respondent contends that Triplett, on December 26, simply repeated his personal opinion on decertification previously expressed to Freilich, when Triplett was still an employee within the meaning of the Act.

Respondent contends that the statements made to Freilich by Giacoletti and Triplett were expressions of their personal opinions and not chargeable to Respondent. While an employer is usually liable for the conduct of its supervisors, an exception exists where the supervisor is also a bargaining unit member. The lead case in the area, *Montgomery Ward & Co., Incorporated*,[3] establishes the following standard:

> Statements made by such a [unit member] supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's ac-

[2] Dominic Giacoletti is the uncle of Daniel Giacoletti, Respondent's plant manager. As an assistant plant superintendent, Dominic Giacoletti attends regularly scheduled supervisory meetings and receives higher wages than the unit employees. Giacoletti's main job function is to expedite production and monitor the safety, quality, and quantity of the work done by his crew. Giacoletti's crew consists of 2 leadmen and approximately 11 employees. He issues work orders to the leadmen, who in turn direct their crews in the performance of their job functions. Giacoletti performs no unit work himself. Giacoletti has the authority to issue disciplinary warnings but does not have the authority to discharge employees. His recommendations with respect to discharge are apparently further investigated by higher management. Giacoletti also has the authority to grant time off to employees. In the decertification proceedings, the Regional Director found two named assistant plant superintendents to be supervisors within the meaning of the Act, but did not rule on Giacoletti's status. Giacoletti voted in the decertification election but this ballot was challenged. No ruling was made on the challenge to Giacoletti's ballot as his vote did not affect the outcome of the election. In this proceeding, Daniel Giacoletti testified that all assistant plant superintendents have the same authority.

On the basis of the above, I find that Dominic Giacoletti is a supervisor within the meaning of Sec. 2(11) of the Act. *Flexi-Van Service Center, a Division of Flexi-Van Corporation*, 228 NLRB 956 (1977); *The New Jersey Famous Amos Chocolate Chip Cookie Corporation*, 236 NLRB 1093 (1978). See also *Wolverine World Wide, Inc.*, 196 NLRB 410 (1972).

[3] 115 NLRB 645, 647 (1956), enfd 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 298 (1957).

tivities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.

That rule is equally applicable where supervisors engage in conduct of a prounion nature. A bargaining unit supervisor, speaking as an employee rather than as a representative of management, has the right to express his opinions as to the identity of his bargaining representative and the terms of the bargaining agreement covering his own conditions of employment. However, Respondent cannot rely on *Montgomery Ward* to avoid the consequences of Triplett's statements. On December 26, Triplett had become a supervisor and was no longer a member of the Union or the bargaining unit. Thus, on December 26, Triplett was a management representative and employees could only assume that he was speaking on behalf of management. Further, Triplett terminated Freilich under circumstances which indicate confirmation of the threatening statements. The fact that Triplett made the same statements to Freilich prior to becoming a supervisor does not, in my view, excuse Respondent from liability. Cf. *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253, 1257, fn. 5 (1964).

The record is unclear as to whether Dominic Giacoletti was a member of the bargaining unit. Giacoletti's job title is not mentioned in the unit description.[4] Giacoletti has been a member of the Union for over 30 years. He receives the fringe benefits provided for in the collective-bargaining agreement. Two other assistant plant superintendents, Oswaldo and Oscar Nunez, were excluded from the bargaining unit by the Regional Director for Region 21 on the ground that they are supervisors within the meaning of the Act. As noted above, the challenge to Giacoletti's ballot was not ruled on because it did not affect the outcome of the election. Giacoletti receives 12-1/2 percent higher wages than the unit employees, as provided for in the collective-bargaining agreement.

Assuming, *arguendo*, that Giacoletti was in the unit and that the rule of *Montgomery Ward* applies, I would still find that Respondent acted in such a manner as to lead employees to reasonably believe that Giacoletti was acting for and on behalf of management. Giacoletti made the same threats and on the same day as Plant Superintendent Triplett. Further, Giacoletti was involved in the discharge of Freilich under circumstances which indicate confirmation of the threatening statements. Accordingly, I find that Giacoletti's statements would tend to intimidate employees and interfere with their rights guaranteed by Section 7 of the Act.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by threatening to discharge employees if they did not withdraw the decertification petition and threatening to close its plant if employees decertified the Union or selected a labor organization other than the Union as their collective-bargaining representative.

[4] All chief engineers, assistant chief engineers, journeyman maintenance engineers, second-class water treatment engineers, leadmen, craters, janitors and maintenance engineer trainees employed by the Employer at its facility located at 17400 Chestnut Street, City of Industry, California; excluding office clerical employees, design engineers, draftsmen, salesmen, guards and supervisors as defined in the Act.

C. *The Discharge of Hernandez*

Manuel Hernandez was employed by Respondent as a machinist from November 1970 until January 14, 1980. On January 14, Hernandez was asked by Triplett to make an orifice plate. Due to the fact that a similar order had been twice countermanded, Hernandez asked Triplett if he were sure he wanted it done. Triplett became annoyed and said, "I tell you what, now, I want you do it now, boy." Next, Hernandez became angry and told Triplett, "the moment I find a boy I will give it to him so he can do it." Triplett answered that he would "get" Hernandez for insubordination.

According to Hernandez, Triplett returned to Hernandez' work station with Oscar Nunez, assistant plant superintendent, and asked Hernandez to come to his office. Hernandez, fearing that he was about to be discharged,[5] stopped on his way to the office and requested that Freilich accompany him as union steward. Triplett would not permit Freilich to be at the meeting but allowed Nunez to accompany Hernandez to the meeting. Having had his request for Freilich's presence denied, Hernandez agreed to have Nunez in attendance.

Thus, Hernandez, Nunez, and Triplett met in Triplett's office. According to Hernandez, Triplett said, "I am going to prove to you that my word is better than yours." Hernandez asked for an explanation and was told by Triplett that he was being fired. Hernandez asked for a reason but Triplett only repeated that Hernandez was fired. Herandez then went to see Jerry McCormick, production manager. Hernandez told McCormick of Triplett's action and asked if McCormick were going to accept it. Not receiving an answer to his satisfaction, Hernandez left the plant.

Triplett testified that he asked Hernandez into his office for the purpose of obtaining assurances that Hernandez would not be insubordinate in the future. Hernandez requested to have Freilich present at the meeting and Triplett denied the request. Triplett testified that he denied the request because Freilich was no longer steward.[6] Hernandez then asked if Nunez would attend the meeting and Triplett agreed to that request. According to Triplett, Hernandez said that Triplett could not fire him because he could not prove anything. Triplett found Hernandez to be uncooperative and terminated the employee at the meeting.

D. *The Offer of Reinstatement to Hernandez*

Edgar Wiley, business representative, filed a grievance protesting Hernandez' discharge. According to Wiley, pursuant to a phone call from Hernandez on January 14 he went to Respondent's plant on January 15 to investigate Hernandez' discharge.[7] Wiley met with Respond-

[5] According to Hernandez, Triplett had stated, upon returning with Nunez, that he was going to fire Hernandez.

[6] There is no evidence that Triplett expressed this reason to Hernandez or Freilich.

[7] Hernandez did not recall calling Wiley or initiating a grievance. Hernandez testified that he did not speak with Wiley concerning his discharge until January 22. However, Hernandez, in a pretrial statement given to the Board, stated that he spoke with Wiley the day after his discharge. Wiley's testimony in this regard is credited.

ent's management and reached an agreement with Scott that Hernandez could return to work on Monday, January 21. Wiley and Scott further agreed that the parties would submit to an arbitrator the question of whether Hernandez was entitled to backpay for the time lost. Scott testified in substantial accord with Wiley, although he placed the date of his discussion with Wiley as January 17. Further, according to Scott, it was not until January 21 that the agreement, set forth above, was finally reached.

According to Wiley, he called Hernandez' home on January 18 and spoke with Hernandez' wife, Elizabeth. Wiley left a message for Hernandez to call him. Wiley had difficulty in reaching Hernandez and, on Monday, January 21, again spoke with Elizabeth Hernandez and told her that it was urgent that Hernandez call him. It was not until Wednesday, January 23, that Hernandez called Wiley. Wiley told Hernandez of his agreement with the Company. However, Hernandez said he was not interested in going back to work for Respondent. Hernandez took the position that returning without full backpay was an admission of wrongdoing—an admission Hernandez was unwilling to make. Wiley asked Hernandez to think the matter over and again called the employee the following evening. Again, Hernandez stated he did not want to return to work for Respondent. On February 2, Wiley approached Hernandez at the Union's business office and volunteered to try again to get Hernandez' job back at Respondent's facility. However, Hernandez reaffirmed his refusal to go back to work for Respondent.

Manuel and Elizabeth Hernandez both testified that the offer relayed to them by Wiley was that Hernandez' discharge would be converted to a suspension. They further testified that Hernandez would not accept such a settlement because he would not admit any wrongdoing—since he had done nothing wrong. I have credited Wiley's and Scott's testimony regarding the union-company settlement of Hernandez' grievance. Further, I credit Wiley's testimony regarding his conversations with Hernandez concerning the settlement and the offer of Respondent to reinstate Hernandez. Both Manuel and Elizabeth Hernandez were quite emotional concerning this matter and, in my view, must have misunderstood Respondent's offer. It was Hernandez' belief that settlement was tantamount to an admission on his part, which caused him to refuse the offer to return to work.

E. *Preliminary Conclusions Regarding the Discharge of Hernandez*

As found above, Triplett asked Hernandez to come to his office in order to obtain assurances from Hernandez that he would not be insubordinate in the future. En route to the office, Hernandez requested Freilich's presence at the meeting as his steward. Although Triplett denied the request because Freilich was no longer steward, no reason or explanation was offered to Hernandez. The meeting was conducted with Triplett, Hernandez, and Oscar Nunez, assistant plant superintendent, present. Triplett did not obtain the assurances from Hernandez that he desired. Rather, Triplett considered Hernandez to be uncooperative and decided at that time to discharge Hernandez. Thus, there can be no doubt that Hernandez was discharged as a result of his conduct at the meeting.

In *N.L.R.B.* v. *J. Weingarten, Inc.*,[8] the United States Supreme Court held, in agreement with the Board, that employee insistence upon union representation at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action against him, is protected concerted activity.

Respondent argues that the *Weingarten* doctrine does not apply in this case on the ground that the meeting between Triplett and Hernandez was not investigatory in nature. Respondent further argues that Hernandez' request was not for a union representative but rather a request for a fellow employee. Respondent contends that such a request need not be honored where, as here, there is an exclusive bargaining representative.

As noted, Respondent first argues that the meeting between Hernandez and Freilich was not investigatory. However, the Bord has held that "the full purview of protections accorded employees under *Weingarten* apply to both 'investigatory' and 'disciplinary' interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action." *Baton Rouge Water Works Company*, 246 NLRB 995 (1979). Whether labeled disciplinary or investigatory, the scope of this meeting went beyond the notification and explanation of previously determined disciplinary action. The purpose of the meeting was to obtain certain assurances from Hernandez that he would not be insubordinate in the future. There can be no doubt that Hernandez reasonably believed that the meeting might result in discipline. In my view this meeting appears to be such a situation contemplated by the Supreme Court, where the presence of a responsible steward would be designated to clarify the issues and bring out the facts and policies concerned at this stage. Further, a steward might give assistance to an employee who may lack the ability to express himself in his case, and who, when his livelihood is at stake, might in fact need the more experienced kind of counsel which his union steward might represent. Moreover, a steward might reasonably be expected to be a factor conducive to the avoidance of confrontation through the medium of discussion and persuasion. See *Weingarten, supra* at 262–263, fn. 7. In my view, Hernandez was an employee in much need of the assistance envisioned by the Supreme Court. Thus, I find that Hernandez had a Section 7 right to representation at the interview herein.

Respondent next argues that Hernandez' request was not valid under *Weingarten* because he requested the presence of a fellow employee and not an authorized steward or agent of the collective-bargaining representative. I reject that argument for the following reasons:

While an employee's right under *Weingarten* arises only in situations where the employee requests representation, there can be no doubt that Hernandez requested that Freilich be permitted to attend the meeting as his union steward. Freilich had been senior shop steward for

[8] 420 U.S. 251 (1975).

2 years and Hernandez was not aware of any change in that position. I find Hernandez' request sufficient to invoke *Weingarten*. Triplett never notified Hernandez of any deficiency in the request.[9] Under such circumstances, Hernandez would reasonably construe Triplett's refusal to permit Freilich to be present as a denial of his request for representation. Clearly, Hernandez had sought representation and had not chosen to participate in the meeting unaccompanied by his union representative. Respondent's argument might have some validity if it had given Hernandez notice of the reason for the denial of his request. But, in the absence of such notice, Triplett's actions could only be construed as a denial of representation.

I find no merit in the contention that Oscar Nunez' presence at the meeting satisfied Hernandez' request. Nunez was a supervisor and was chosen by Triplett as his witness. The fact that Hernandez, having been denied the assistance of his representative, preferred to have Nunez present rather than meet with Triplett alone, does not minimize the violation.

Respondent cannot now be heard to argue that there was no union representative present on its premises at the time of Hernandez' request. Whether Wiley or any other union representative or steward was available is unknown. Respondent, having denied Hernandez' request, without explanation, did not permit the question—how Hernandez' request for representation could lawfully be handled—to arise.

In sum, I find that Respondent violated Section 8(a)(1) of the Act by conducting a meeting with Hernandez after having denied his request for union representation and further violated Section 8(a)(1) by discharging Hernandez for his conduct at said meeting.

F. *Preliminary Conclusions Regarding the Offer of Reinstatement to Hernandez*

Under the Board's recent ruling in *Kraft Foods*,[10] the General Counsel has made a *prima facie* showing that a make-whole remedy[11] is warranted by having proven that Hernandez was discharged for conduct which occurred at the unlawful interview. In order to negate the *prima facie* showing of the appropriateness of a make-whole remedy, Respondent must demonstrate that the discipline was not based on information obtained at the unlawful interview. Here, Triplett admits that Hernandez' uncooperative attitude and failure to give the desired assurance were the causes for the discharge. Thus, the unlawful interview and the discharge are so interrelated that a make-whole remedy must be recommended.

However, Respondent offered Hernandez reinstatement as of January 21, 1980. The issue of backpay was to be resolved later. Apparently, Hernandez was under the belief that by accepting the offer he was compromising in some manner his claim to backpay. It is well established that Hernandez had a duty to mitigate Respondent's backpay liability and by failing to accept the offer Hernandez forfeited his right to further backpay. See, e.g., *National Screen Products Co.*, 147 NLRB 746, 747–748 (1964); *The Cooper Thermometer Company*, 154 NLRB 502, 508 (1965); *Ampex Corporation*, 168 NLRB 742, fn. 3 (1967). However, due to the uncertainty caused by such an offer, Hernandez will not be deemed to have waived his right to unconditional reinstatement. Therefore, Respondent will be ordered to offer Hernandez reinstatement.[12] Respondent's backpay liability to Hernandez will be limited to the period from January 14, 1980, the date of his unlawful discharge, to January 21, 1980, the date on which Respondent's offer of reinstatement was effective, and from the date 5 days after the date of this Order to the date on which Respondent offers him reinstatement pursuant thereto.

G. *The Discharge of Kenneth Freilich*

Freilich was employed by Respondent as a journeyman maintenance engineer from December 1973 until his discharge on April 8, 1980. During the 2 years preceding his discharge, Freilich served as senior shop steward for the Union. As discussed above, during the contract negotiations between Respondent and the Union, Freilich became disenchanted with the performance of Union Agent Edgar Wiley. Contemporaneously with the consummation of negotiations between Respondent and the Union, Freilich filed the decertification petition in Case 21–RD–1663 on December 10, 1979. On December 18, Freilich filed the unfair labor practice charge in Case 21–CA–18509. Freilich's views on the Union and decertification caused him to argue with Supervisors Triplett and Dominic Giacoletti.

As discussed above, Triplett and Dominic Giacoletti each told Freilich on December 26 that the decertification activities could cause the closing of the plant and the resultant loss of jobs for all employees. Wiley testified that, as a result of Freilich's filing of the decertification petition, he terminated Freilich's position as steward. Wiley became acting steward and business representative. Wiley testified that he announced to the employees that Freilich was no longer steward and that he would personally handle grievances.[13] On April 7, shortly before the scheduled election in the decertification proceedings, Triplett called a meeting of employees. In the presence of Wiley, Triplett told the employees that Wiley was there to hold an election for a new shop steward.

Freilich interrupted the meeting and told the employees that the meeting might be a trick to set aside the decertification election. Freilich said the steward election was not legal because he and junior steward Hunt had not been voted out and, therefore, no election for ste-

[9] Cf. *Texarkana Memorial Hospital, Inc., d/b/a Wadley Hospital*, 238 NLRB 829 (1978), where the fact that a union was newly installed and had not designated which individuals would serve as shop stewards did not relieve the employer of its affirmative duty to allow employees representation.

[10] *Kraft Foods, Inc.*, 251 NLRB 598 (1980).

[11] Such as reinstatement and backpay.

[12] Nevertheless, if Hernandez does accept reinstatement, Respondent is not foreclosed from lawfully requiring assurances from Hernandez that he will not be insubordinate in the future. See *Illinois Bell Telephone Company*, 251 NLRB 932 (1980).

[13] Freilich denied receiving notice that he was no longer steward. Triplett corroborated Wiley's testimony that Freilich was no longer union steward after the decertification petition was filed.

ward could take place. Freilich and Hunt told the employees to go back to work. As the employees began to return to work, Triplett stopped them and ordered them back to the meeting. The election was then held and employee Luther Villa was elected steward.

The next day, April 8, Freilich was terminated as a result of a series of events about which there is conflicting testimony. According to Freilich, between 8 and 9 a.m., Oscar Nunez, assistant plant superintendent, told him to turn in his pipefitter tools. Nunez told Freilich that he was being transferred to the paint shop, "as a form of punishment, because of the union business that was at hand." Nunez then suggested that Freilich see a doctor in order to obtain proof that the assignment was hazardous to Freilich's health. According to Freilich, Nunez was aware of his respiratory problems.

Nunez, on the other hand, testified that he asked Freilich to help the painter with some grinding work. At that time, Freilich told Nunez that he had a respiratory problem and Nunez answered that the only way he would release Freilich from the assignment was if Freilich had a doctor's release. Nunez denied telling Freilich that the assignment was a punishment. Nunez testified that Freilich's assignment that date was routine. However, his testimony was confused as to how Freilich was selected for this assignment. Triplett also testified that the assignment was routine and further testified that Freilich was chosen because he was between assignments. Both Triplett and Nunez denied any prior knowledge of Freilich's helath problem.

After his conversation with Nunez, Freilich attended a meeting in Triplett's office concerning Hunt's work performance. Hunt requested that Freilich attend as shop steward. Triplett told Hunt that Freilich was not a shop steward but allowed Freilich to attend the meeting as a courtesy to Hunt. Freilich advised Hunt not to say anything as it would only harm his case. Hunt was then given a 3-day suspension without pay. According to Triplett, Freilich said that Triplett was judge, jury, and hangman. Freilich further said that the whole matter involving Hunt was a frameup and that he (Freillich) was going to get the Union decertified.

Freilich testified that he informed Triplett of his allergy to spray paint. Triplett answered that Freilich was going into the paint shop and said, "if you can't cut the mustard, you are going to be leaving." Freilich asked if Triplett would allow him to prove his allergy by submission of a doctor's certificate and Triplett agreed to do so.

Freilich spoke with John Colon, an employee of Respondent who was on leave due to an injury. Colon made an appointment for Freilich with his doctor and made arrangements to pick up Freilich so that they could both visit the doctor. At approximately 10 a.m., Colon arrived at Respondent's premises to pick up Freilich. Freilich began to look for Nunez to get permission to leave for his appointment when he came across Triplett. Freilich testified that Triplett said, "if you go to the doctor, I will terminate you." Thereafter Triplett said, "I will give you permission to go to the doctor." However, because he did not trust Triplett, Freilich continued to look for another supervisor. Freilich then obtained permission to visit the doctor from Bill Anderton, assistant plant superintendent. As Freilich walked towards the timeclock to punch out, Triplett shouted to him, "if you are not careful . . . you may drop dead . . . and you ought to let go of all this union business or you may have a heart attack." Freilich replied, "don't worry about my heart attack . . . you better look out for your buddy over there" (referring to Dominic Giacoletti,[14] who was also present). Freilich then punched out his timecard and, accompanied by Colon, began to leave the premises. Dominic Giacoletti followed Freilich and made derogatory gestures and noises.

Freilich returned to Respondent's plant with a note saying that he was better suited for work other than painting because of his reaction to paint fumes. Upon his return to the plant, Freilich went to Nunez' office. Nunez had Triplett paged and Triplett came to Nunez' office. Triplett took the note from Freilich, read the note, and threw it down. Triplett told Freilich that the note was not necessary because Freilich was terminated. Freilich asked Triplett to put the termination in writing and Triplett said that it was not necessary.

Triplett's version of these events is quite different. Triplett testified that Freilich requested permission to go to the doctor and he gave Freilich his permission. However, Freilich responded that Triplett was a "f— liar" and that he wanted to obtain permission to leave from another supervisor. Freilich found Anderton and asked Anderton to witness that Triplett had given him permission to leave. Unexplainedly, Freilich became agitated, pointed his finger at Triplett, and said, "I hope you can take it." As Dominic Giacoletti walked into the area, Freilich pointed towards him and said, "I hope he can take it too." Giacoletti answered, "I can take it." According to Triplett, Freilich began generally cursing the Company, the Union, Giacoletti, and Triplett. Freilich continued cursing as he walked away and Triplett told him to "simply go to the doctor." At that point, Freilich then pointed to his posterior and told the supervisors to "kiss it." Triplett then said, "Ken, you are terminated for insubordination." Triplett followed Freilich to the timeclock and repeated his statement that Freilich was terminated for insubordination. Freilich told him to put it in writing and left.

At approximately 1 o'clock, Freilich returned to the plant. Triplett received a call from Nunez and went to Nunez' office. Triplett was told that Freilich had a doctor's slip but said that the point was moot because Freilich had been terminated 2 hours previously. Triplett's testimony with regard to Freilich's discharge is substantially corroborated by that of Dominic Giacoletti.

Colon, still employed by Respondent,[15] testified that he called Freilich at the plant during the morning of April 8. Freilich asked Colon to make an appointment with Colon's doctor. When Colon entered the plant looking for Freilich, he saw Triplett and Freilich talking. Colon heard Triplett tell Freilich that, if he went to the doctor, he would be terminated and heard Freilich reply that he had a doctor's appointment and was going to see

[14] Dominic Giacoletti has a history of heart problems.

[15] At the time of the hearing, Colon was still on leave due to a work-related injury.

the doctor. As Freilich and Colon walked towards Colon's car, Dominic Giacoletti followed them making derogatory gestures and noises. Colon denied that Freilich made any of the statements attributed to him by Triplett and Giacoletti.

Colon testified, contrary to Triplett, Nunez, and Giacoletti, that he was present when Freilich returned to the plant from the doctor's office.[16] According to Colon, Triplett, when handed the doctor's note by Nunez, threw the note on the floor and told Freilich that he was terminated. Freilich asked Triplett to put it in writing and Triplett, declining to do so, walked out of the office.

I credit Colon's testimony regarding these events. Colon testified in a straightforward and candid manner. Further, while still in Respondent's employ, Colon testified adversely to his employer and for that reason his testimony is not likely to be false. Having credited Colon's testimony, I credit Freilich's testimony which is for the most part consistent therewith and discredit the testimony of Triplett, Nunez, and Giacoletti to the contrary.

H. *Preliminary Conclusions Regarding the Discharge of Freilich*

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board announced the following causation test in all cases alleging violation of Section 8(a)(3) of the Act or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. As the issue here is Respondent's motive for discharging Freilich, the *Wright Line* test applies.

Based on the credited version of these events, Freilich was not discharged for pointing to his posterior and telling his supervisors to "kiss it." On the day in question, Freilich was transferred to the paint department with the message that he was being punished because of "the Union business." Freilich received both permission from Triplett to visit the doctor and a threat of termination if he went to the doctor. Upon his return to the plant, Freilich was discharged without explanation. Respondent's lack of a credible reason for the discharge supports an inference that it had an unlawful motive for the discharge. See, e.g., *Bacchus Wine Cooperative, Inc., and Bacchus Wine International*, 251 NLRB 1552 (1980); *General Thermo, Inc.*, 250 NLRB 1260 (1980); *Party Cookies, Inc.*, 237 NLRB 612, 623 (1978); see also *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). I draw the inference that the motive of the discharge is one Respondent desires to conceal—a discriminatory and unlawful motive.

Support for the General Counsel's case is also found in the statements made by Triplett that if Freilich "continued with [the decertification], he and the rest of the troublemakers would be terminated." Also, Dominic Giacoletti, the other supervisor involved in the termination, told Freilich that if he did not withdraw the decertification petition, he would be fired. Further, Giacoletti said that the Union would remain and that Freilich and the "rest of the troublemakers" would be the ones to go. An inference may be drawn from such animus, which the discharge would gratify, that the animus was the true reason for the discharge. *General Thermo, Inc., supra*, fn. 4; *Best Products Company, Inc.*, 236 NLRB 1024, 1026 (1978).

Under all of the circumstances, the General Counsel has established its *prima facie* case. Thus, the burden shifts to Respondent to demonstrate that Freilich would have been discharged in the absence of his protected conduct. However, Respondent has failed to rebut the *prima facie* case The sole reason for Freilich's discharge has been discredited, leaving the conclusion that Freilich was discharged for his protected activities.

Respondent argues that it did not interfere with Freilich's activities, which began on December 10, and that the period of time in which it permitted such activities supports its contention that Freilich's protected conduct did not contribute to the discharge. However, the timing of the discharge shortly before the scheduled decertification election supports an inference that it was intended to demonstrate to employees the penalty for voting for or otherwise supporting decertification. Cf. *Capital Bakers, Inc.*, 236 NLRB 1053, 1058 (1978). Further, the record shows that the discharge occurred shortly after Freilich voiced opposition to Triplett's holding of an intraunion election for steward. Finally, Freilich was discharged the same day that he acted as employee Hunt's representative, and counseled the employee not to argue with Triplett but rather to file charges with the Board.

Accordingly, for all the reasons noted above, I find that Respondent's discharge of Freilich violated Section 8(a)(3) and (1) of the Act. In view of the fact that the remedy would be substantially the same, I find it unnecessary to determine whether the discharge also violated Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by threatening to discharge employees if they did not withdraw a decertification petition; by threatening to close its plant if employees decertified the Union or selected a labor organization other than the Union as their collective-bargaining representative; by denying the request of employee Manuel Norberto Hernandez to have union representation at an investigatory interview which he reasonably believed might result in disciplinary action against him; and by discharging Hernandez based on his conduct at said unlawful interview.

[16] Triplett and Giacoletti denied seeing Colon in the plant on April 8. Nunez testified that he saw Colon during the morning of April 8 but that Colon did not accompany Freilich into the plant during the afternoon.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by unlawfully discharging Kenneth Freilich, Sr., because of his activities in support of a decertification petition.

5. The unfair labor practices specifically found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discharged employee Manuel Norberto Hernandez in violation of Section 8(a)(1) of the Act and employee Kenneth Freilich, Sr., in violation of Section 8(a)(3) and (1) of the Act, I shall order Respondent to offer each discriminatee immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. I shall order Respondent to make Freilich whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, by paying to him a sum of money equal to the amount he normally would have earned in wages from April 8, 1980, the date of his discriminatory discharge, to the date of Respondent's valid offer of reinstatement, less net earnings during said period. I shall order Respondent to make Hernandez whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, by paying to him a sum of money equal to the amount he normally would have earned as wages from January 14, 1980, the date of his discriminatory discharge, to January 21, 1980, the date on which Respondent offered him reinstatement, and from the date 5 days after this Order to the date on which Respondent offers him reinstatement pursuant thereto, less net earnings during said periods. The amount of backpay due each discriminatee shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Olympic Medical Corporation*, 250 NLRB 146 (1980). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[17]

The Respondent, L. A. Water Treatment, Division of Chromalloy American Corporation, City of Industry, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge if they do not withdraw a decertification petition.

(b) Threatening employees with plant closure if they decertify the incumbent union and/or select a labor organization other than the incumbent as their collective-bargaining representative.

(c) Denying the request of union representation to employees at investigatory interviews when the employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action.

(d) Discharging any employee on the basis of information obtained at an investigatory interview where it has denied the employee's request to have union representation at said interview.

(e) Discharging employees because of their activities on behalf of a petition to decertify International Union of Operating Engineers, Local No. 501, AFL–CIO, as the collective-bargaining representative of its employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Offer to Manuel Norberto Hernandez and Kenneth Freilich, Sr., immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole Hernandez and Freilich for any loss of earnings they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to agents of the Board, for examining and copying, the records, social security records, timecards, personnel records, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Post at its City of Industry, California, facility copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[17] All outstanding motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."